PUBLIC BANK BHD

v.

NIKSENG DEVELOPMENT SDN BHD

COURT OF APPEAL, KUALA LUMPUR
SHAIK DAUD ISMAIL JCA
SITI NORMA YAAKOB JCA
MAHADEV SHANKAR JCA
[CIVIL APPEAL NO: W-02-147 OF 1996]
4 NOVEMBER 1996

CIVIL PROCEDURE: *Striking out - Want of prosecution - Inordinate delay in prosecuting claim - No substantial risk to a fair trial - No serious prejudice occasioned to respondent - Whether order for striking out improper - Whether calling for interference of appellate Court - Trial Judge failing to give sufficient weight to appellant's affidavits - Whether fatal - Order 25 r. 1(5) Rules of the High Court 1980*

This was an appeal against the decision of the High Court upholding the decision of the Senior Assistant Registrar striking out the appellant's writ and statement of claim for want of prosecution. Before the learned appeal Judges herein, the appellant conceded that there was indeed an inordinate delay of more than three years in prosecuting the claim, but argued, nevertheless, that, since the delay had not entailed any substantial risk for a fair trial, and had not caused serious prejudice to the respondent, it was wrong of the Court below to have dismissed the action for the reason given.

It was quite apparent that the learned judge below, in coming to the decision he did, relied on the affidavit averments of the respondent claiming, *inter alia*, that certain material documents, by reason of the delay, were no longer in their custody. No consideration, however, was given by the learned Judge to the appellant's contrary averments, or to other affidavits filed by the respondent in another suit, which has since been consolidated with the present suit, claiming that those same documents were in fact still available. In the circumstances, before the appellate Court herein, issues arose as to: (i) whether the delay, albeit being an inordinate and inexcusable delay, was likely to give rise to a substantial risk that a fair trial, in all probability, would not be able to be held (ii) whether the delay had occasioned serious prejudice to the respondent, and (iii) whether justification existed for the appellate Court to interfere with the finding of the Court below.

Held:
Per Shaik Daud Ismail JCA

[1] The decision of the learned Senior Assistant Registrar in allowing the application by respondent to strike out the appellant's action and the upholding of that decision by the learned Judge is an exercise of judicial discretion, a matter rerely interfered with by an appellate Court. In appropriate cases, however, the appellate Court should and would interfere where it can be seen clearly that the decision was wrong.

[2] It cannot be gainsaid that in an action of this nature, a substantial part of the appellant's case, if not the entire case, rest on documentary evidence. Witnesses, therefore, play an insignificant part.

[2a] The respondent had claimed that they had possession of the relevant documents when to do so would be to their advantage, but had claimed otherwise when it was not to their advantage to claim that they had the documents in their possession. The respondent ought not to be allowed to blow hot and cold on this matter. On the facts, the respondent cannot be heard to say that most of the documents missing.

[3] The learned Judge had placed very great weight and considerations on the contents of the affidavits filed on behalf of the respondent, but had given no sufficient weight or no weight at all to the contents of the affidavits filed for the appellant. This is reason enough for this Court to interfere and reverse the learned Judge's decision.

[4] There was sufficient evidence, some of which went unchallenged, which showed that the delay is not likely to give rise to a substantial risk that a fair trial would not in all probability be able to be held. The delay, furthermore, would also not occasion serious prejudice to the respondent.

[Appeal allowed. Decisions of SAR and learned Judge set aside. No order as to costs on account of appellant's admission as to inordinate delay.]

*[**Bahasa Malaysia** Translation of Headnotes]*

PROSEDUR SIVIL: *Pembatalan - Ketiadaan pendakwaan - Kelewatan melampau dalam mendakwa tuntutan - Tidak terdapat risiko yang substansial kepada satu perbicaraan yang adil - Tiada kemudaratan yang serius disebabkan kepada responden - Samada perintah untuk membatal tidak wajar - Samada memanggil campur tangan Mahkamah rayuan - Hakim perbicaraan gagal memberikan penekanan secukupnya kepada afidavit perayu - Samada memudaratkan - Aturan 25 k. 1(5) Kaedah-kaedah Mahkamah Tinggi 1980*

Ini merupakan rayuan terhadap keputusan Mahkamah Tinggi yang mempertahankan keputusan Penolong Kanan Pendaftar membatalkan writ dan pernyataan tuntutan perayu kerana ketiadaan pendakwaan. Di hadapan Hakim-hakim rayuan yang bijaksana, perayu mengakui bahawa telah berlaku kelewatan yang melampau selama lebih daripada tiga tahun dalam mendakwa tuntutan itu, tetapi berhujah, bahawa, oleh kerana kelewatan itu tidak melibatkan sebarang risiko yang substansial bagi mengadakan satu perbicaraan yang adil, dan tidak juga menyebabkan kemudaratan yang serius terhadap responden, ianya adalah salah bagi Mahkamah menolak tindakan itu atas alasan yang diberikan.

Ianya agak jelas bahawa Hakim yang bijaksana di bawah, dalam mencapai keputusan yang dicapainya itu, bergantung kepada penegasan dalam afidavit responden yang menghujah, antara lainnya, bahawa beberapa dokumen yang tertentu, disebabkan oleh kelewatan itu, tidak lagi berada dalam jagaan mereka. Tiada pertimbangan, walaubagaimanapun, telah diberikan oleh Hakim yang bijaksana kepada penegasan-penegasan lain perayu yang bercanggahan, atau kepada afidavit-afidavit yang telah difailkan oleh responden dalam satu guaman yang lain, yang telah digabungkan dengan guaman semasa ini, yang menghujah bahawa dokumen-dokumen yang sama itu pada hakikatnya masih boleh diperolehi. Dalam keadaan yang sedemikian, di hadapan Mahkamah rayuan di sini, isu-isu telah berbangkit berhubung dengan: (i) samada kelewatan berkenaan, walaupun merupakan suatu kelewatan yang melampau dan tidak dapat dimaafkan, berkemungkinan boleh menyebabkan berbangkitnya satu risiko substantial bahawa suatu perbicaraan yang adil, dalam semua kebarangkalian, tidak mungkin dapat diadaklan; (ii) samada kelewatan itu telah menyebabkan kemudaratan yang serius kepada responden, dan (iii) samada justifikasi wujud bagi Mahkamah rayuan mencampuri keputusan Mahkamah di bawah.

Diputuskan:
Oleh Shaik Daud Ismail HMR

[1] Keputusan Penolong Kanan Pendaftar dalam membenarkan permohonan responden untuk membatalkan tindakan perayu dan pengesahan akan keputusan itu oleh Hakim yang bijaksana adalah merupakan perlaksanaan budibicara kehakiman, suatu perkara yang jarang sekali dicampuri oleh sebuah Mahkamah rayuan. Bagaimanapun, dalam kes-kes yang wajar, Mahkamah rayuan harus dan akan mencampuri di mana ianya jelas dapat dilihat bahawa keputusan itu adalah salah.

[2] Adalah tidak boleh dinafikan bahawa dalam sesuatu tindakan seperti ini, sebahagian besar daripada kes perayu, jika tidak keseluruhannya, bergantung pada keterangan dokumentari. Saksi-saksi, dengan itu, memainkan peranan yang tidak penting.

[2a] Responden telah berhujah bahawa mereka mempunyai dalam milikan mereka dokumen-dokumen yang relevan apabila hujah sedemikian mendatangkan manfaat bagi mereka, tetapi telah menuntut sebaliknya apabila hujahan bahawa mereka memiliki dokumen-dokumen tersebut tidak memberikan manfaat kepada mereka. Responden tidak seharusnya dibenarkan membuat sesuatu hujahan dan kemudian menterbalikkan hujahan tersebut sesuka hati mereka. Berdasarkan fakta, tidak beralasan bagi responen untuk menyatakan bahawa kebanyakan daripada dokumen-dokumen itu telah hilang.

[3] Hakim yang bijaksana telah meletakkan penekanan dan pertimbangan yang kuat ke atas kandungan afidavit-afidavit yang telah difailkan bagi pihak responden, tetapi telah tidak memberikan penekanan yang secukupnya atau pun tiada penekanan sama sekali kepada kandungan afidavit-afidavit yang telah difailkan untuk perayu. Ini merupakan alasan yang cukup untuk Mahkamah ini mencampuri dan mengakaskan keputusan Hakim yang bijaksana.

[4] Terdapat keterangan yang secukupnya, sebahagiannya tidak dicabar, yang menunjukkan bahawa kelewatan di sini tidak berkemungkinan akan membangkitkan risiko yang substansial bahawa satu perbicaraan yang adil, dalam semua keadaan kebarangkalian, tidak dapat diadakan. Kelewatan itu juga tidak menyebabkan kemudaratan yang serius kepada responden.

[Rayuan dibenarkan. Keputusan-keputusan Penolong Kanan Pendaftar dan Hakim yang bijaksana diketepikan. Tiada perintah bagi kos disebabkan pengakuan perayu berhubung dengan kelewatan yang melampau.]

Cases referred to:
Ward v. James [1965] 1 All ER 563 ***(foll)***
Ladd v. Marshall [1954] 3 All ER 745 ***(foll)***

Legislation referred to:
Rules of the High Court 1980, O. 25 r. 1(5)

[Appeal from High Court Malaya, Kuala Lumpur; Civil No: D2-22-1427 of 1991]

For the appellant - Yeoh Chong Kong & Chua Eng Siong; M/s. Iza Ng Yeoh & Kit
For the respondent - K. Ramesh & K. Roy Sreenivasan; M/s. K.K. Chong, Chai & Koo & Partners

JUDGMENT

Shaik Daud Ismail JCA:

This appeal is from the decision of the High Court Kuala Lumpur which had upheld the decision of the Senior Assistant Registrar who had struck out the appellant's writ and statement of claim for want of prosecution.

The appellant had filed an action against the respondent for the recovery of RM6,395,763.02 plus interest on 25 October 1991. The respondent in turn filed a defence and counterclaim. Pleadings closed an 19 March 1992. Pursuant to an order of the High Court dated 6 May 1996, this suit was consolidated with two other suits in which the respondent herein had sued the appellant. The present solicitors for the appellant took over conduct of the present case on 25 August 1994 from the previous solicitors, M/s. Chooi & Co. By a summons in chambers dated 27 July 1995 the respondent applied for the writ and statement of claim to be struck off for want of prosecution pursuant to O. 25 r. 1(5) of the Rules of the High Court 1980. The appellant conceded that there was a delay of some three years eight months since the date of the closure of pleadings. The appellant also conceded that there was inordinate and inexcusable delay. It is submitted an behalf of the appellant that, the power of the Court to dismiss an action for want of prosecution should only be exercised not only where the Court is satisfied that there has been inordinate and inexcusable delay on the part of the appellant or their solicitors but also that such delay will give rise to a substantial risk that it is not possible to have a fair trial or is such as is likely to cause serious prejudice to the respondent. It is submitted that in the circumstances of this case, the respondent has failed to prove this.

Since the appellant has conceded that there was inordinate and inexcusable delay in prosecuting this case, there is therefore no need for us to go into that. The only question to be decided is whether by such delay it gave rise to a substantial risk that it is not possible to have a fair trial or to have caused a serious prejudice to the respondent.

The pleadings show that the respondent had been a long time customer of the appellant bank and on that premise, the appellant had afforded loan facilities to the respondent up to an aggregate of some RM6,000,000. In consideration of this facility, the respondent executed a debenture in favour of the appellant and as collateral, the respondent had charged several lots of land to the appellant and a letter of guarantee was executed by three directors of the respondent. From all these it cannot be gainsaid that in an action of this nature, a substantial part of the appellant's case, if not the entire case, rest on documentary evidence. Therefore, witnesses will play an insignificant

part. In this respect the appellant in their various affidavits had consistently averred that all the relevant documents pertaining to their claim are available.

As for the directors who executed the guarantee, the respondent in its affidavit in support of the summons in chambers dated 8 August 1995 affirmed by one Hon Fah Tai, averred that one Mr. Nik Che Kok had resigned from the respondent company in 1987 and had accordingly disposed of his shares in the company and for the past four years was living in either England or Ireland and could not be traced. Another apparently key witness, one Mr. Goh Poh Seng, does not possess any more shares in the respondent company and his whereabouts are unknown.

The affidavit in reply affirmed on 2 November 1995 by one Looi Kam Thin, a branch manager of the appellant bank, discloses facts substantially contrary to the averments of Hon Fah Tai. It is disclosed that both these witnesses are still a part of the respondent company and are available to be called as witnesses, if necessary.

In the case of Mr. Nik Che Kok, the alter ego of the respondent at the material time, he was in fact present in the High Court giving evidence on behalf of the respondents in another trial in which the respondent had sued the appellant *vide* Kuala Lumpur Civil Suit No. S7-22-316-89. He was present on three dates i.e. 17 April 1996; 17 July 1996; and 3 September 1996. It would appear that the facts of the respondent's claim against the appellant in suit S7-22-316-89 and the facts in the present action are substantially the same. The respondent had served the affidavit verifying the list of documents of Hon Fah Tai, affirmed on 19 July 1994 and the list of documents dated 19 July 1994 on the appellant. It was categorically stated in the list of documents that the documents listed therein are in the respondent's possession, custody or power. This has not been denied by the respondent. In the light of this surely the respondent cannot now be heard to say that most of the documents are missing. It seems clear that when it appears to be to their advantage, the respondent claims that all the relevant documents are in their possession but when it appears to be not to their advantage, they claim the documents are not available. The respondent ought not to be allowed to blow hot and cold on this matter. As for another director Mr. Goh Poh Seng, the same affidavit of Looi Kam Thim discloses that, the latest records of the Registrar of Companies *vide* letter dated 1 February 1994 shows that he is still the director of the respondent. It also discloses that Goh Poh Seng & Sons has substantial shareholding in the respondent company. In the light of this, it is our view that the inordinate delay in this case, would not be likely to give rise to a substantial risk that it is not possible to have a fair trial and that such delay would not, in all probability, occasion serious prejudice to the respondent.

We recognise the decision of the learned Senior Assistant Registrar in allowing the application by respondent to strike out the appellant's action and the upholding of that decision by the learned Judge is, an exercise of judicial discretion, a matter rarely interfered with by an appellate Court. In appropriate cases, however, the appellate Court should and would interfere where it can be seen clearly that the decision was wrong. In this respect we refer to what Lord Denning said in *Ward v. James* [1965] 1 All ER 563 at p. 570:

> ... this Court can, and will, interfere if it is satisfied the Judge was wrong. Thus it will interfere if it can see that the Judge has given no weight (or insufficient weight) to those considerations which ought to have weighed with him ...

Our perusal of the records of appeal show that while the learned Judge placed very great weight and considerations on the contents of the various affidavits filed on behalf of the respondent the learned Judge seems to give no weight at all or no sufficient weight to the contents of the affidavits filed on behalf of the appellant. For instance, the learned Judge gave weight to the averment about the difficulty of tracing the witness Nik Che Kok but failed to give any weight at all to the reply by the appellant. The learned Judge also failed to give any weight to the averments an behalf of the appellant on the issue of the list of documents provided by the respondent which shows those documents are in fact available. In the light of this we feel that this is one of the instances where it would be justified for this Court to interfere and reverse the learned Judge's decision.

It is our view that there is sufficient evidence, some of which is unchallenged, to show that the delay as occasioned in this case, would not likely give rise to a substantial risk that a fair trial would not in all probability be able to be held. In the circumstances of this case, we are also of the view that the delay would not occasion a serious prejudice to the respondent.

At the outset of this appeal we considered a motion by the appellant to adduce fresh evidence, which evidence was unavailable at the High Court hearing on 15 February 1996 as the event, mentioned therein, had not transpired then. We allowed the motion on the principle in *Ladd v. Marshall* [1954] 3 All ER 745.

For this reason we allowed the appeal, set aside the decisions of the learned Senior Assistant Registrar and that of the learned Judge but we made no order as to costs as we are mindful of the appellant's admission that there had been inordinate delay on their part to prosecute their claim. We also ordered that the deposit is to be refunded.

Reported by WA Sharif